DEPARTMENT OF STATE REVENUE

04-20120287.SLOF

Supplemental Letter of Findings: 04-20120287
Gross Retail Tax
For the Years 2007 through 2009

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ISSUE

I. Gambling Machine Payments – Use Tax.

Authority: IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that it is not required to self-assess use tax on amounts it paid for what it categorizes as intangible "royalty payments."

STATEMENT OF FACTS

Taxpayer operates an Indiana casino. The Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional tax. Taxpayer disagreed with portions of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer explained the basis for the protest. A Letter of Findings was issued sustaining Taxpayer's protest in part and denying it in part. Taxpayer disagreed with the Letter of Findings explaining that, because it had been denied the right to provide the documentation it wished to present, it was entitled to a rehearing. The rehearing was granted and this Supplemental Letter of Findings results.

I. Gambling Machine Payments – Use Tax.

DISCUSSION

Taxpayer paid money to a company designated here as "Vendor." The Department's audit found that Taxpayer should have self-assessed use tax on the payments made to Vendor explaining that:

> These fees are licensing fees for the privilege of using a casino game name. [Taxpayer] would not be allowed to have these gaming machines on the casino floor if it was not for the payment of the licensing fee. Although the taxpayer is not acquiring ownership rights, it is purchasing the right to use the name on various slot machines, video poker machines and other gaming machines.

The audit concluded that the payments constituted consideration for "using the name on the casino game" and the payments were "equivalent to [the] rental of tangible personal property."

Taxpayer disagrees stating that the payments were "royalty payments" and that these payments for the right to intangible property are not subject to sales or use tax.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

Taxpayer correctly points out that sales and use tax are assessed on the price paid for "tangible personal property." Taxpayer argues that it is not paying for "tangible personal property." See, e.g., IC § 6-2.5-3-2(a) (the use tax imposition statute).

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer provided additional information purporting to establish that it had previously purchased the gambling machines in order to buttress its claim that it was not "renting" the devices.

In addition, Taxpayer provided a copy of the agreement with Vendor which purportedly memorializes its agreement with Vendor and which obligates Taxpayer to make the payments at issue in this Supplemental Letter of Findings.

The agreement requires Taxpayer – as "licensee" to "pay royalties" based on the "daily status" of each of the gambling machines and when the machines are "on line and available for play." The agreement excuses Taxpayer from paying royalties when the gambling machines are "unavailable for play due to Licensee's actions," "unavailable for play due to regulatory requirements or for Force Majeure reasons" or "in transit."

The agreement allows Taxpayer to employ computer software and base EMPROMs ("A type of memory chip

that retains its data when its power supply is switched off." Wikipedia: EPROM, http://en.wikipedia.org/wiki/EPROM (last visited November 8, 2013)). At the termination of the agreement, Taxpayer is required to return the "EPROMSs" to Vendor "via overnight delivery using Federal Express or UPS, at [Vendor's] sole expense." In addition, upon termination of the Agreement, Taxpayer is required to "immediately cease using the [gambling machines] and shall deliver to [Vendor] all of the [gambling machines] provided per the requirements of [the agreement]."

Taxpayer maintains that the payments at issue are solely compensation for the right to use intangible intellectual property such as trademarks and designs. The Department is unable to agree because the agreement provides that Taxpayer is paying for the right to possess tangible personal property such as the computer chips and the software associated with the operation of the gambling machines. See IC § 6-2.5-1-27 (providing that "prewritten computer software" constitutes "tangible personal property.")

Taxpayer has failed to establish that the payments at issue are solely for the right to employ Vendor's intangible intellectual property. Taxpayer's right to retain and employ the gambling machines and the gambling machines' EPROMs and associated software are clearly central to the agreement entered into with Vendor.

FINDING

Taxpayer's protest is respectfully denied.

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